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United States Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,
vs.
ANGELO DALO,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

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This is a personal injury action, the plaintiff and defendant in error having been injured on the 13th day of January, 1917, by falling into an ore chute in one of the defendant's mines, namely, the Morning Mine, situated near Mullan, in the County of Shoshone, State of Idaho. The facts are comparatively simple. The defendant in error was employed as a mucker, and prior to the accident had been working at No. 7 chute which

was twenty-five feet away from No. 6 into which he fell, this being situated on the 6th floor of the stope above one of the working levels in defendant's mine. The plaintiff had been familiar with the surroundings for some time and it appeared that No. 6 chute had not been drawn for ten days or two weeks. He testified that he had walked over the muck covering the opening into No. 6 chute for a period of ten or twelve days (Tr. p. 62). At the time of the accident the chute extended from the working level to the sixth floor above the same, and the chute was drawn on the morning of the accident about eight thirty and it then appeared that it was hung up from the fourth floor upwards; in other words, for two floors (Tr. p. 85). The plaintiff's witness Milette was the chute tender whose duty it was to knock down chutes in case they were hung up (Tr. p. 79). Milette thereupon proceeded up the manway along the chute and pounded upon the chute with a hammer, which was the usual and proper method of knocking down the chutes, and emptied the same (Tr. p. 81). In order to protect the manway and the men who must use the same it becomes necessary to cover up the manway at the top, that is to say, on the floor from which material is shoveled into the chute, and consequently it is impossible for the chute tender to get through to the floor on which the opening into the chute is situated; and it is not his duty to do so (Tr. p. 82). It is very seldom that a chute hangs up over the hole, that is, that material remains on the top of the opening after the chute is drawn. The plaintiff

testified that he had never known of such a condition (Tr. p. 64), and Milette, the chute tender, testified that it is very seldom that such a thing occurs. (Tr. p. 84). The shift boss has a number of levels under him and is able to make the rounds only about twice a day. Upon this day he went to the place where the plaintiff was working and to the top of this chute at 8 o'clock that morning (Tr. p. 175), and did not get to the place again until immediately after lunch, that being subsequent to the time the accident occurred (Tr. p. 176). The accident occurred at about eleven thirty, or three hours after the chute had been knocked down by the chute tender (Tr. p. 49). Upon this evidence it is contended by the defendant that, the danger having arisen during the progress of the work and in the doing of a detail thereof and being of unusual occurrence, and no contention being made that the defendant had actual notice of the existence of the danger, sufficient time had not elapsed to charge the defendant as a matter of law with notice.

At the close of all the testimony the defendant requested the court to give two instructions which the Court refused to give. These instructions are found in the transcript at pages 233 and 234. Particularly requested instruction No. 2 was intended to call the attention of the jury to the fact that before they could find for the plaintiff they must first find that the defendant either had actual notice of the danger attendant upon the said chute being hung up on the sixth floor and over the opening in the chute, or that sufficient

time had elapsed from the time that said condition arose until the time of the accident, to warrant the inference that the defendant should, in the exercis of ordinary care, have discovered the condition, that is to say, that the defendant had constructive notice thereof.

There is another feature of the case to be considered, and that is the ruling of the trial court in excluding the evidence of Dr. William F. Rolfs—whose name through error is printed as William F. Ross. It appeared that Dr. Rolfs had attended the plaintiff prior to the time of the accident. Plaintiff claimed that as a result of falling into the said chute he sustained a hernia and Dr. Rolfs was asked whether or not prior to the accident he had provided a truss for Mr. Dalo for said hernia (Tr. p. 145). At the close of all the testimony, the Court being particularly interested in this question, and inasmuch as it was thought by the Court that, in order to properly raise the question of the admissibility of Dr. Rolf's testimony over the objection that the communication was privileged, an offer of proof should be made, the Court requested the defendant to make such offer which will be found at pages 235 and 236 of the transcript.

The assignments of error which the defendant will rely upon in this case are as follows:

I.

The evidence does not disclose that the injuries complained of by the plaintiff were sustained by reason of

any carelessness or negligence on the part of the defendant which was either the proximate cause of said injuries or contributed in any case thereto.

II.

The Court erred in refusing to give the defendant's requested instruction No. 1.

III.

The Court erred in refusing to give defendant's requested instruction No. 2.

IV.

The Court erred in sustaining the plaintiff's objection to the following question propounded Dr. Rolfs:

> "Q. Doctor, prior to that time state to the jury if Mr. Dalo had a hernia and whether or not a truss was provided for him."

And in sustaining the plaintiff's objection to the offer of the defendant to prove by Dr. Rolfs that prior to the time the plaintiff went to work for the Federal Mining & Smelting Company and prior to the accident the plaintiff suffered from a hernia and was supplied by the doctor with a truss to relieve said condition.

ARGUMENT.

I.

The Master Was Not Negligent.

The best reasoned cases draw a clear distinction be-

tween the duty of the master in respect of a structural defect and his duty in respect of defect which arises in the course of the operation or progress of the work. If a defect is found to have been structural the master, owing a continuous duty to maintain a place, machinery or appliances in a reasonably safe condition, is not required to have actual notice of the defect, and it is not necessary that a sufficient length of time should have elapsed so that a jury might say that the master should have ascertained the defect and either warned the servant thereof or remedied the condition. On the other hand, if a place of work, machinery, or appliances are originally reasonably safe, the master has performed his full duty toward the servant in respect of furnishing the same and is not responsible for a defect occurring therein which is due to the progress of the work, unless the master had actual notice that such defect occurred, or that such a length of time had elapsed between the time that the dangerous condition arose and the time of the accident, to warrant the inference that, in the exercise of ordinary care, he should have discovered the same by means of inspection, and have, either removed the danger, or warned the servant of the existence thereof.

At the trial of the case it was the contention of the defendant, and it is now the contention of the defendant, that the defect which arose in the course of the drawing of the chute by reason of the fact that the chute hung up over the opening or top thereof, was a defect and consequent danger arising in the progress

of the work, and was not only unknown to the defendant, but that a sufficient length of time had not elapsed between the time the condition arose and the time of the accident to the plaintiff to charge the defendant with constructive notice thereof. It will be borne in mind that the chute tender Milette knocked down the chute at about eight thirty in the morning and the accident occurred at eleven thirty; in other words but three hours had elapsed. It will further be remembered that the shift boss had made his rounds and visited this place prior to the time the chute was drawn, that is, at a time when the condition was perfectly safe, and did not, in the course of his duties, return to this place until after the accident. The hanging up of the chute over the opening was not such a usual or common occurrence that it can be said as a matter of law that the master was required to keep a lookout continuously for such an occurrence. The plaintiff, who had been a mucker for a long time and had had ample opportunity to observe such conditions if they had theretofore arisen, stated that in his experience he had never known of such a condition, and Milette, the chute tender stated that the hanging up of a chute over the opening was an unusual occurrence, and that ordinarily and usually the method employed by the defendant of knocking down chutes by pounding thereon with a hammer released all material, including such as might be lying over the opening, causing the same to fall to the bottom thereof, and leaving the opening clear so that its condition is readily observable by those who have occasion to pass by the same.

The principle for which we contend is aptly stated in the case of *Hicks v. Hammond Packing Co.,* 171 S. W. 937 (Mo.), which was a case where a step on a stairway became defective. The Court say:

> "Such is the substance of the testimony of defendant's witnesses, and it is contended that plaintiff's own testimony conclusively shows that the defect was not in existence when he went to work that morning. The fact is important in its bearing on the issue as to whether or not defendant, as master, exercised reasonable care to provide its servants a reasonably safe place in which to work, and the Court properly instructed the jury to find for the defendant if 'the defective condition complained of did not exist prior to the day plaintiff was injured.' That was an application of the rule that a master is entitled to a reasonable time and opportunity to discover and repair a defect in the place of work which arises *during the progress of the work* and an expression of the conclusion as one of law that the brief period which elapsed between the ascent and descent of the stairway by plaintiff on that day would not permit constructive notice of a defect created during that period. Consequently in finding for the plaintiff the jury, thus instructed, must have believed from the evidence that the defect had been in existence before that day, and that in the exercise of reasonable care defendant should have discovered and repaired it. A careful examination of all of the evidence has led

> us to the conclusion that this finding has substantial support, and therefore that the Court did not err in refusing to give the jury a preemptory instruction to find for the defendant."

And right here it may be noted that the Court refused to submit the case at bar to the jury upon the theory that the master should have had either actual or constructive notice but submitted it upon the sole theory that the defendant failed to exercise reasonable care if it did not anticipate and prevent such condition and consequent injury (Tr. p. 227).

In the case of *St. Louis I. M. & S. Ry. Co. v. Coke*, 175 S. W. 1177 (Ark.); a conductor on one of defendant's trains was injured by reason of the fall of a bridge through which the caboose on which he was riding was precipitated. The question was as to whether or not the cause of the bridge falling was the result of a rail which had become defective in the course of operation or was the result of a structural defect in the bridge. The Court on page 1182 say:

> "It is the duty of the master to exercise ordinary care to provide the servant with a safe place in which, and safe appliances with which, to do his work, but where the injury to the servant results from a defect that is not structural then, in order to render the master liable, it must first appear that he knew, or by the exercise of ordinary care, should have known, of such defect." (Citing a number of cases.)

In the case of *Nelson v. R. J. Reynolds Tobacco Co.*, 57 S. E. 127, it appeared that a passage was was blocked. The concrete negligence, if any existed, was the failure on the part of the defendant to provide a reasonably safe place for the ingress and egress of its employes. The Court refused to submit to the jury the question of whether or not the defendant was negligent in causing the passageway to be blocked. The Court say:

> "There is no evidence that the passage way was *per se* unsafe, or that it was rendered unsafe by crowding hogshead in it on any other occasion than the afternoon of the day the plaintiff was hurt. The duty to provide a reasonably safe place to work in, as well as of ingress and egress, is like unto the obligation to provide machinery that is not defective. The trouble must be brought to the master's knowledge, or it must be shown that the master by the exercise of reasonable diligence might have acquired such knowledge. (Citing a number of cases.) We find no evidence of habitual or continual crowding, or any other evidence which would charge the defendant's management with the knowledge that the passage way was being rendered unsafe."

In the case of *Klineintie v. Nashua M. F. G. Co.*, 67 Atl. 573 (N. H.), it appeared that oil had been spilt upon the floor of the room in which plaintiff worked and she fell and broke her arm. She had been at the

place of the accident forty-five minutes and again five minutes before the time she fell, at which times she saw no oil on the floor. The Court on this state of facts say:

> "When the cause of the servant's injury is a condition of the master's instrumentalities produced either by ordinary wear or by the negligence of fellow servants he must show either that his master did, and he did not know, or that his master was, and he was not in fault for not knowing, of the defect in time to prevent the accident. St. Pierre v. Foster, 74 N. H. 4; 64 Atl. 723. In this case there is no evidence from which it can be found that the defendants either knew, or ought to have known of the condition of the floor before the accident. Consequently there is no evidence from which it can be found that they failed to perform any duty the relation of master and servant imposed upon them for the plaintiff's benefit."

In the case of *Acme Box Co. v. Gregory*, 105 S. W. 350 (Tenn.), it appeared that there was a hole in the floor back of where the plaintiff worked, and into which he stepped, causing him to throw his arm over a saw. The hole had been in such an open condition for 4 1-2 hours prior to the accident. In passing upon this state of facts the court say at page 351:

> "But we do not think that the facts show any negligence on the part of the master, since the defect was one that suddenly appeared, and it is not shown that the master had any knowledge of it.

> It is, of course, the duty of the master to exercise reasonable care to inspect the premises and the place where his servants are engaged. But we do not think any presumption of negligence could arise from his failure to inspect during 4 1-2 hours covering the period of existence of the hole unprotected by the patch, when no indication of any wrong was communicated to him by those under whose immediate observation the defect was; that is the defendant in error and his fellow servants."

Pockrass v. Kaplan, 139 N. Y. Supp. 398, was a case where a statutory guard had been removed by a servant without the knowledge of the defendant, and it was held that before the defendant could be charged with negligence in maintaining said saw without such guard, it must have had either actual or constructive knowledge of the fact that the same had been removed.

Schlappendorf v. Am. Ry. Traffic Co., 141 N. Y. Supp. 486, was a case where a servant was injured an hour and a half after a fellow servant had discovered the displacement of a clip on a cable and reported it to one whose notice was notice to the company. The Court say at page 487:

> "The plaintiff was injured within so brief a time after Plank discovered the displacement of the clip and had communicated that fact to Burns—estimated from forty minutes to an hour and a half—the jury would not have been justified in finding any fault of diligence in inspection after the accident or in repair."

Tracy v. Hedden Const. Co., 134 N. Y. Supp. 114, was a case where a plank with a nail in it was left on a runway, due to which the plaintiff was injured. The Court say at page 115:

> "One of plaintiff's witnesses testified that he had used the runway in question several times on the afternoon of October 30th, the last time within twenty minutes or half an hour prior to the plaintiff's accident, and that the piece of plank with the nail in it was not then there. I do not see how the defendant could be charged with constructive knowledge of the presence of the plank with the nail in it on the runway."

In the case of *Peet v. H. Remington & Son Pulp & Paper Co.,* 83 N. Y. Supp. 524, it appeared that a hole was left in the floor through which a plank fell, striking the plaintiff, and causing him to come in contact with machinery upon which he was working, causing injuries to him. Upon this state of facts the Court held that the master was not responsible on the ground that he did not know, and in the exercise of reasonable care could not have known of the condition prior to the happening of the accident.

In the case of *Burke v. The National India-Rubber Co.,* 44 Atl. 307 (R. I.), the plaintiff was injured by falling upon a slippery floor rendered so by grease left thereon by other employes who had been directed by the defendant to clean out a pit formerly occupied by the gearing of a machine. The floor had been left in

such condition for a period of from two to three hours The Court say at page 308:

> "The short interval of time between the leaving of the grease on the floor and the accident to the plaintiff was insufficient to charge the defendant with notice of the condition of the floor and thereby render him liable for a breach of duty to the plaintiff to furnish him safe premises on which to work."

And on rehearing, the contention having been made that the case fell within the principle that the master is required to furnish reasonably safe premises for the servant, the Court draws the clear distinction between structural defects and those occurring during the progress of the work, and say:

> "But we do not think that the case fails within this principle. The defect was not a defect in the construction of the floor itself, but that which was complained of as rendering the floor dangerous was the grease adhering to the brick composing the floor, which had been thrown upon it in the cleaning out of the pit by Mahr and Farley and which had been on the floor but two or three hours, an interval as we thought too short, in the absence of actual notice, to charge the defendant with constructive notice of the condition of the floor. The cleaning up of floors of manufacturies is a part of the duty of the employe, rather than of the master; and if such work is not prop-

> erly done and an accident results to an employe in consequence, the negligence in the absence of notice of the conditions to the master, is clearly, as it seems to us, the negligence of fellow servant or servants."

The Federal Courts have often enunciated this principle though Federal cases have not been found which bear as close analogy to the facts of the case at bar as some of the cases found in the state reports.

However, in the case of *Barrett v. Virginia Ry. Co.*, 244 Fed. 397, it appeared that a step on an engine was defective, and in holding that knowledge of the defendant was an essential element in its negligence, if any, the Circuit Court of Appeals of the Fourth Circuit, at page 399, say:

> "While it is well settled that the master must exercise ordinary care in providing for the servants reasonably safe, sound and suitable machinery and appliances, and also to use ordinary care to discover and repair defects, the master does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care could have known, that such machinery and appliances had become defective and were in an unsafe condition. In other words, it must appear, in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged

to have caused the injury, and these facts must be established by legal evidence." (Citing many cases.)

And in the case of *Patton v. Illinois Central Ry. Co.*, 179 Fed. 530, it appeared that in an action by a brakeman for injuries sustained by the breaking of a ladder rung on the side of a car, there was no proof that the defendant knew of the defect in time to have repaired it, or that its condition had lasted so long that it could have been discovered by the use of ordinary care. District Judge Evans in the opinion of the Circuit Court, says at page 535:

> "Or probably it might be more accurate to say that an averment of negligence in failing to provide safe appliances made against the master by an employe, is not sustained unless there is substantial evidence that the master had actual knowledge of a defect in time to have repaired it before the injury, or that the defect had existed so long that knowledge of it should be imputed to the master if it were such that reasonably careful investigation would have developed its existence."

And in the case of *Omaha Packing Co. v. Sandusky*, 155 Federal 897, which was a case where drippings from a truck froze upon a platform, the Circuit Court of Appeals of the Eighth Circuit say, at page 900:

> "Neither is the rule which makes it the positive duty of the master to provide the servant a reasonably safe place in which to work, even if it

extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. In this case, if the platform became dangerous during the day, it was by reason of this trucking carried on in the progress of the work, either necessarily or from the manner in which the work was done by other employes, and, if the platform became dangerous through their negligence, that was one of the risks which the plaintiff assumed when he entered the defendant's employment."

And in the case of *Bush v. Cincinnati Traction Co.*, 192 Fed. 241, which was a case where a cross-wire broke, pulling a lug out of the wall of the building from the weight of the cross-wire against which the plaintiff was leaning, the Circuit Court of Appeals of the Sixth Circuit state the rule as follows, page 243:

"The rule is well settled that an employer is not the guarantor of the safety of appliances furnished for the use of the employe, or with which the latter will in the course of his employment naturally come in contact; that the employer is bound only to furnish reasonably safe appliances and to protect the employe from such danger in the performance of his work as in the exercise of ordinary care and prudence can be provided against; that the employe is presumed to assume the risks

> of such injury from accident as are incident to the nature and character of the employment, and against which the employer could not, in the exercise of ordinary care, have protected him; and that no recovery can be had against an employer where the defect causing the injury was unknown to the employer and could not have been known in the exercise of ordinary care."

The case of *Norfolk & Western Ry. Co. v. Reed,* 167 Fed. 16, was a case of a defective brake handle on a foreign car which had come into the yard at three a. m. and the accident occurred at eleven a. m. The Circuit Court of Appeals for the Fourth Circuit approved the following statement of the law made by the trial court in his opinion which is quoted on page 5 of the reporter as follows:

> "It is undoubtedly true that the general rule governing the proof requisite in the case of servants injured by defects in machinery or appliances requires that the plaintiff prove, not only the defect, but that the master either knew of it, or that it had existed for a sufficient length of time to warrant the fair presumption that he should have known of it."

And in applying this rule to the evidence in that case the Court held that as a matter of law the master was not negligent in failing to discover the condition of the brake within that time.

II.

The Court erred in not giving defendant's requested instruction No. 1, *as follows: "Gentlemen of the Jury, the plaintiff in this case does not claim that the defendant Mining Company was negligent in not warning the plaintiff of the possibility of the chutes hanging up upon the floor, and you are instructed that failure to warn or instruct is not negligence which caused or contributed to the accident, and therefore the plaintiff can not claim a recovery against the defendant in this case because of such failure."*

As indicated the Court submitted this case to the jury solely upon the theory that the master should have anticipated the condition causing the accident, that is, that the master did not fulfill its full duty and obligation if it did not actually discover the condition and remove the same. There was no complaint made or theory propounded that the plaintiff's want of knowledge that such a condition might arise, caused the injury, and it was intended by this requested instruction to guard the jury against an error in concluding that the master was negligent in failing to warn or instruct the plaintiff that such a condition might arise. We think clearly the instruction should have been given.

This matter should be considered in connection with the refusal of the Court to grant requested instruction No. 2.

III.

The Court erred in refusing to give defendant's re-

quested instruction No. 2, as follows: "You are instructed that before you can find defendant guilty of negligence in failing to discover and remove the danger which resulted in plaintiff's accident and injury, you must first find that, in view of all the circumstances in the case, sufficient time had elapsed before the accident to enable the defendant, in the exercise of ordinary care, to have discovered and removed the danger."

The Court instructed the jury as follows, and as we understand it this is the essence of the instruction covering the duty of the defendant (Tr. pages 26 and 27):

> "But it is the duty, as I have already stated, of the employer, and was the duty of the defendant in this case, by a reasonable system of carrying on this work and by reasonable inspection from time to time, to discover and to eliminate dangers which were unnecessary, and were reasonably avoidable. That is especially true where work is being carried on at different places, by different employes, so that there is no direct connection between the work of one and that of another. Now, in the light of what I have said to you, you will consider all the circumstances in evidence in this case and say whether or not the conduct of the defendant company measures up to the general standard to which I have directed your attention; that is to say, whether in the light of all these circumstances the defendant company exercised the degree of care which an ordinary prudent employer would,

under the circumstances, have exercised, in order to anticipate and prevent such injury."

This instruction so far as it goes, may perhaps not be considered as erroneous inasmuch as the Court advised the jury that the duty of the master to "anticipate and prevent" injury is based upon the duty to make a reasonable inspection from time to time for the purpose of discovering and eliminating such danger, but the instruction does not go far enough in that it fails to advise the jury under what conditions inspection, anticipation and prevention of injury are the measurable duty of the master. Such defect would manifestly have been supplied had the Court given the second request of the defendant whereby the jury would in substance have been advised that under the circumstances of this case the duties of inspection, anticipation and prevention on the part of the master arise only in the event of actual knowledge of the condition which had arisen during the progress of the work, or in the event of a sufficient lapse of time between the occurrence of the danger and the accident to charge the defendant with constructive notice.

If it should be contended in this particular case that, although only a very short time, to-wit: a matter of three hours, had elapsed between the time the danger arose and the time of the accident, the time was long enough so that as a matter of law a court could not say that the defendant could not have had constructive notice of the danger but might have had an opportunity in the exercise of reasonable care to remedy the same:

nevertheless it can not likewise be said that as a matter of law the time was sufficient to charge the master with constructive notice; but the question as to whether or not such a sufficient length of time had elapsed, should at least have been submitted to the jury.

In the case of *Hirsch Bros. v. Ashe,* 80 S. W. 650 (Tex.) it appeared that a defective ladder was furnished to the plaintiff. The plaintiff averred in his petition that the ladder so furnished the plaintiff by the defendant was wholly insufficient and fatally defective; that such insufficiency and defective condition of said ladder was not patent and open to his observation, and the same was unknown to the plaintiff and unsuspected by him; that the insufficiency of said ladder and its defective condition were known to the defendant, or by the exercise of ordinary care might have been known to them. The defendant requested the Court to give the following instruction:

> "The jury are charged that the master is liable for defects in appliances furnished his servant with which to work only when he knew or by the exercise of ordinary care could have known of the existence of the defect. Unless, therefore, you believe from the evidence that the ladder broke as alleged by plaintiff because of some defect therein, and that the defendant knew, or could have known of the existence of such defect, if any, by the exercise of reasonable care, then you will return a verdict for the defendants."

Instead of this the Court charged as follows:

"And if you further believe from the evidence that the defendant negligently failed to furnish plaintiff with a proper and sufficient ladder—that is, one which was reasonably safe, with which to do his work as directed—and negligently furnished him with a defective and insufficient ladder which was not reasonably safe for the purposes for which it was used, etc., you will find for the plaintiff. If you do not believe from the evidence that plaintiff's injuries were, and are the proximate result of negligence upon the part of defendants, then you will find your verdict for the defendants."

And further instructed the jury:

"You are charged that negligence is the failure to exercise ordinary care; that is to say, it is a failure to exercise that degree of care which a reasonably prudent man would have exercised under the same, or similar, circumstances."

In commenting upon the giving of this instruction and the failure to give the instruction requested by the defendant, the Court say:

"While this would not be positive error requiring a reversal of the case when considered in connection with the pleading, it was error to refuse the defendants' requested instruction defining the circumstances under which they should be held negligent. They had the right to have the attention of the jury directed specifically to the

defense that they did not know of the defect in the ladder, if it was defective, and could not, by the exercise of ordinary care, have discovered the same."

And in the case of *Winslow v. Missouri K. & T. R. Co.,* 192 S. W. 121 (Mo.), it appeared that a hole was left along a side track of the defendant railway company. The Court, on page 125, say:

"Conceding that the hole made the place not reasonably safe, plaintiff can recover only in case the defendant knew, or in the exercise of ordinary care, might have known of the presence of the hole in time to have removed it before the accident."

And upon the failure of the court to advise the jury that the defendant could only be held liable in case it knew, or in case it could have, in the exercise of ordinary care, ascertained the presence of the hole, the Court say at page 125:

"Furthermore, plaintiff's instructions do not submit the question of whether defendant had actual notice. They nowhere ask the jury to say whether the defendant knew of the hole, nor, if so, whether defendant had such knowledge sufficiently long before the action to have enabled it to have repaired the same in the exercise of ordinary care. An instruction must be explicit and submit to the lay minds of the jury the concrete facts which determine whether the defendant 'carelessly and negligently permitted' the hole to exist in its rail-

way yard. To ask the jury whether the defendant carelessly and negligently permitted the hole to exist in its yard, without telling them what will constitute a negligent permission, is to submit a question of law to the jury.

"Again upon closer examination, it will be found that it does not even submit this question of law to the jury. It says that, if the jury find from the evidence certain facts as to plaintiff's employment, his duty to inspect cars and closed doors, etc., and that in the performance of his duty he got into the car, and while alighting from said car door he stepped or jumped into a washout hole, or depression, which the defendant carelessly and negligently permitted to exist in its railway yard at the station, and which it carelessly and negligently permitted to be covered with weeds or brush, and was injured, then the verdict should be for the plaintiff. This is a description of the hole or an assertion that it was carelessly or negligently permitted to exist, and not a submission of that question to the jury."

In the case of *Howard v. Bedenville Lumber Co.*, 108 N. W. 48, which was a case of a hole in the floor through which a piece of wood fell and injured the plaintiff, the Court gave the following instruction to the jury:

"You are instructed that it was the duty of the defendant to provide a place that was reasonably

safe for the plaintiff to do his work in while in the exercise of reasonable care."

And, in the language of the Appellate Court, gave further instructions in connection therewith, well calculated to impress upon the minds of the jury the idea that such rule applies, not only to the time the working place is originally furnished to the servant, but to every instant of time thereafter during the period of his employment. Such instructions the Court held to be very misleading and in commenting thereon say:

"'True, it is the duty of the master to furnish the servant with a reasonably safe place in which to work. True, that duty is absolute. It cannot be delegated by the master. It cannot be performed by him merely exercising ordinary care to furnish such place. It is satisfied only by the actual furnishing thereof. But that refers to the time the servant is put to work, not to every time when, thereafter, in the course of continuous employment at the customary intervals he re-occupies his place, not to every instant of time during the period of his employment. A reasonably safe working place having been furnished the plaintiff, the absolute duty in that regard is satisfied. Then becomes active the secondary duty to exercise ordinary care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving an injury thereby before the master has knowledge of the

existence of the danger, or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable." (Citing a great number of cases.)

And quoting from the case of *Olson v. Maple Grove C. & M. Co.*, 115 Ia. 74; 87 N. W. 736, the Court say:

"The doctrine that the master must provide a safe place has no application to the case where the place becomes unsafe during the progress of the work."

And in the case of *American Sheet & Tin Plate Co. v. Bucy*, 87 N. E. 1051, the trial court gave the following instruction to the jury:

"No. 2. If you find, by a fair preponderance of the evidence in this case, that the plaintiff was in the employ of the defendant on the 6th day of January, 1906, engaged with two other men employed by the defendant company, in moving by means of trucks, as described in the complaint, tin plate from one portion of the building to another, and that there was provided by the defendant company a track-way composed of wooden planks nailed and attached to sleepers imbedded in the ground, and that from said runway there led off running in a lateral direction, other certain iron cross-runways constructed of steel or iron, and that the approaches to said runways where the same were constructed of steel and iron, were made of wood, but being attached to joists or

sleepers, imbedded in the ground; and you find by a fair preponderance of the evidence that the cross-runway adjacent to sorting table No. 2 was so negligently constructed that the wooden end of the cross-runway extending along sorting table No. 2 was weak and springy and gave down when the loaded truck was drawn thereon by the plaintiff and his employes, so that when being drawn in a careful and prudent manner it struck against the iron runway by reason of the wooden approach, giving down and lowering by reason of the weight of the load upon the track, and you further find that plaintiff was using due care and proceeding in a proper manner in conveying said loaded truck, and you further find that, by reason of the depression of the wooden approach to the iron runway, the wheels struck against the iron runway and caused the load of tin upon the same to topple over and fall upon the plaintiff and injure him as complained of in the complaint—then the defendant company would be guilty of negligence in the manner of constructing the runway as it approached the iron portion thereof, and if it was properly constructed, but became out of repair so that it gave down when the load passed over it like plaintiff and co-employes were drawing, the company would be negligent in so maintaining the same; and if the plaintiff without fault on his part, contributed to his injury at the time, then your finding should be for the plaintiff."

In commenting upon this instruction the Court say at page 1052:

> "It is urged that this instruction is defective in two respects. First, that it instructs the jury that if said runway became out of repair the company would be negligent in so maintaining the same without informing the jury that before said company could be held negligent, either it should have knowledge of such defective condition or that the same had existed for a sufficient length of time to imply knowledge; second, that the instruction wholly fails to instruct the jury as to the element of assumed risk. It will be observed that the instruction directs the jury to find for the plaintiff if they find a certain state of facts to be true. This is a positive direction and warranted the jury in finding for plaintiff notwithstanding it should be convinced from the evidence that the defective condition was unknown to appellant, and had only existed a very short time, or that it should find for the plaintiff notwithstanding he was wholly familiar with such defective condition, either of which findings would be unwarranted under the law."

In the case of *Mallott v. Sample*, 74 N. E. 245 (Ind.) a complaint which failed to state the length of time that a defect had existed and to show facts from which it could be determined either that the defendant knew, or in the exercise of reasonable care, could have known of

the defects, was insufficient. The case is a brief upon the question under consideration.

There being no contention on the part of the plaintiff in this case that the defendant had actual knowledge of the existence of the danger, the Court should have submitted to the jury the question of whether or not in the exercise of ordinary care under the existing condition, the master ought to have known of the danger prior to the accident and have remedied the same.

IV.

The Court erred in refusing to permit Dr. Rolfs to testify that long prior to the accident to the plaintiff alleged in his complaint the plaintiff suffered from a hernia and that the doctor prescribed and procured a truss for the plaintiff.

Section 5958 of the Revised Codes of Idaho provides as follows:

> "Section 5958. There are particular actions in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases:
>
> 4. A physician or surgeon cannot, without the consent of his patient, be examined in civil actions as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

It is well settled that the privilege may be waived and

it is the contention of the defendant that, when a plaintiff in a personal injury suit gets upon the stand and testifies to the nature and character of his injuries, he waives his privilege and can not thereafter claim it, especially in a case where, by the claiming of the privilege, he would be committing a manifest fraud upon the court and the defendant.

Plaintiff and his physicians testified that one of the severest injuries suffered by him as the result of the accident was a hernia. The defendant was in a position to prove by Dr. Rolfs that the plaintiff had this hernia prior to the accident and that the doctor had prescribed and procured a truss for him. The theory upon which the privilege is allowed is that the law will not permit the public disclosure of ailments of a patient by a physician to whom the patient has disclosed such ailments, but the logic of the principle is entirely lost when a patient himself gets upon the stand and publishes to the world the nature and character of an injury to the full extent to which he has disclosed the same in confidence to his physician; and to say that such disclosures to the physician must thereafter be treated in confidence by the physician is to entirely destroy the reason for the rule, especially when the plaintiff is thereby permitted to suppress the evidence of his own fraud and perjury.

There is perhaps no writer who speaks with greater authority upon the subject of evidence than is Mr. Wigmore, who discusses this subject under the head of privileged communication between physician and pa-

tient in Vol. 4 of his work on Evidence, and we particularly call the Court's attention to paragraph 2389 thereof where Mr. Wigmore uses the following language:

> "Same; Waiver by Bringing Suit; by Testifying; by Former Waiver. (1) In the first place, the bringing of an action in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: 'One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But, stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim; I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the Court will forbid his testimony.' If the utter absurdity of this statement (which is

virtually that of every such claimant) could be heightened by anything, it would be by the circumstances (frequently observable) that the dreaded disclosure, which the privilege prevents, is the fact that the plaintiff has suffered no injury at all. In actions for personal injury, the permission to claim the privilege is a burlesque upon logic and justice. In actions upon insurance policies, where fraudulent misrepresentations as to health are in issue, the insured's initial conduct in volunteering a supposedly full avowal of his state of health has put him in the position of abandoning any desire to be secretive towards the insurer on that subject, and of giving the insurer in fairness the right to ascertain the truth; and a waiver should be predicated by the nature of the action. Yet here the injury to justice by denying a waiver is not so considerable; for in fairness (that is, to honest applicants, who have nothing to fear) the insurer ought immediately to make his extrinsic investigations among prior attendant physicians (which commonly he does not do), instead of waiting till more premiums have been paid and the insured has left the world; so that here the moral inequities are more nearly balanced, and no particular harm is done by the privilege—except to the logic of the law. In testamentary causes, there is ordinarily no conduct amounting to waiver—although it is otherwise unsoud (ante, 2381, 2384) to treat the data of sanity and insanity as having been consciously confided, in any sense of the word, to

the physician. So far as judicial rulings go, only actions against a physician for malpractice have been deemed to involve a waiver.

"(2) The party's own voluntary testimony, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue; the reasons here being merely somewhat stronger than those above noted. Courts have rarely conceded this; though statutes have often enacted it. Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege."

In the case of *Lane v. Boycourt, 27* N. E. 1111, the Supreme Court of Indiana use the following language:

"We come now to a question presented by the ruling denying a new trial. The appellee, his wife, and his wife's mother testified as to all that was done by the appellant at the time the surgical operation which caused the injury to the appellee's wife was performed. The appellant also testified, without objection, to what occurred at that time. He then called Dr. Williamson, who was in attendance as a consulting surgeon, but the trial court refused to permit him to testify to any matter that occurred at the time the operation was per-

formed by the appellant. In our judgment this was error. The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waved the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public, in a court of justice, the occurrences of the sick-room for the purposes of obtaining a judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician or the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction, it is fully opened to investigation, if opened at all by the party having a right to keep

it closed. A patient cannot elect what witnesses shall be heard and what shall not; for if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses; but, where he himself removes the obligation, he cannot avail himself of the statute to exclude witnesses to the occurrence."

Also see *Reinhan v. Dennin*, 9 N. E. 3204 (N. Y.).

Morris v. N. Y. O. & W. Ry. Co., 42 N. W. 410 (N. Y.).

Lawson v. Morning Journal Ass'n, 52 N. Y. Supp 484.

In re *Burnett*, 55 Pac. 575, wherein it was held that where a party to a cause publishes confidential communications in newspapers he waives the privilege. This was a case of attorney and client.

The case of *State v. Long*, 165 S. W. 749 (Mo.), is a brief on the subject of waiver of privilege by testifying and calling one physician, and a quotation therefrom would be too long.

Deadly parallel is the case at bar with *McPherson v. Harvey*, 183 S. W. 653 (Mo.). This was a personal injury action in which the plaintiff recovered substantial damages. She testified that owing to the accident she sustained severe abdominal injuries and was substantiated in this testimony by a physician who attended her. Subsequent to the trial the attorneys for the defendant discovered that instead of her condition be-

ing the result of the accident, it had existed for a long time prior thereto, and that she had been attended by another physician who endeavored, however unsuccessfully, to alleviate the condition. A motion for a new trial was made upon the ground of newly discovered evidence which was granted by the trial court. The question squarely presented was whether or not the testimony of the attending physician was privileged, and in holding that the lower court did not err in granting a new trial because of the fact that the said newly discovered evidence was not privileged, the Court say:

> "The most important question for solution in the consideration of the ruling of the court is whether or not the newly discovered evidence, which consists of the knowledge a physician of plaintiff acquired of her state of health during the existence of the confidential relationship between them of physician and patient, is privileged and may not be used against plaintiff without her consent. There can be no doubt that it was privileged at the beginning of the trial, and, if plaintiff had done nothing to waive such privilege, defendants would not have had the right to offer the witness at the trial, and therefore could not avail themselves of his testimony as newly discovered evidence. In her own testimony, as well as in that of her physician and surgeon, plaintiff went into the subject of her malady, exposing everything and concealing nothing, except the highly important fact, if it be a fact, that the malady was not caused by the injury, but was of long standing and had been accurately

diagnosed, but unsuccessfully treated, by a physician for almost two years. In the recent case of Michaels v. Harvey et al., 179 S. W. 735, after a careful review of the decisions of the Supreme Court bearing on the subject, we applied the just and sensible rule announced in State v. Long, 257 Mo. (Loc. Cit.) 221, 165 S. W. 748, that where the patient for purposes of gain or advantage discloses the nature and secrets of his malady he renounces his statutory privilege, and opens the door to a full judicial injuiry into the subject-matter of his own importation into the case, and that where several physicians have treated the patient for the same trouble it can make no difference that their treatment was at different dates. Under this doctrine, the physician would have been a competent witness at the trial, and we pass to the question of the propriety of the ruling in granting a new trial on the ground that his testimony should be treated as newly discovered evidence within the technical meaning of that term."

The case of *Roeser v. Pease,* 131 Pac. 534, is likewise on all fours with the case at bar. In this case it appeared that the plaintiff's testimony was to the effect that prior to the accident she was in good health but that since the accident she had poor health and had suffered a great deal with her back and had headaches and was unable to work without the occurrence of these pains; that prior to the accident she had not had these backaches and headaches to amount to anything. In holding that the testimony of a physician who had

treated the plaintiff for headaches prior to the injury, was not privileged, and that by herself testifying and calling another physician she had waived any privilege which she might otherwise have claimed, the Supreme Court of Oklahoma say, page 536:

> "Counsel for the plaintiff and defendant do not disagree as to the law. Both sides concede that the doctor's testimony is protected by the plaintiff's privilege, unless she has waived it by offering herself as a witness on the same subject; and whether or not she had testified on the same subject is the point of issue between counsel. The subject, of course, is the condition of her health some six or seven or eight months prior to the accident, at which time Dr. Grosshart testifies as to her condition. Did she testify on this subject at the trial? The substance of her testimony is to the effect that she was in good health just before the accident; that for a year previous to that time she, as a rule, was a healthy woman; that she never had a headache to amount to anything at all. From this testimony it appears that she did testify generally as to the condition of her health prior to the accident, and specifically that she was not accustomed to having headaches before that time. Some authorities are cited by the plaintiff tending to show that one does not waive the privilege by giving testimony as to his general health or physical condition. But in the case at bar the plaintiff not only testified as to her general health, but she testified specifically with reference to headaches. Here the exact

point at issue was whether or not these headaches and backaches, from which she testified that she was suffering at the time of the trial, were permanent injuries caused by the accident. The effect of her testimony was to lead the jury to believe that she had not suffered from these same afflictions prior to the accident. If she can go upon the witness stand and testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition. The theory upon which the privilege is based is that a person is entitled to have his physical disabilities protected from public curiosity. If, however, he goes into a court of justice and bases an action upon the existence of a physical disability, and testifies himself as to its existence or nonexistence, he, of course, is not entitled longer to claim a privilege for his condition, and the statute does not contemplate protecting him in such case. An interesting discussion of the subject is contained in the fourth volume of Wigmore on Evidence, paragraph 2380 et seq."

The case of *Epstein v. Pennsylvania Ry. Co.*, 250 Mo. 1; 156 S. W. 699, Ann. Cas. 1915, A. 423, likewise is a brief and we shall content ourselves by citing the same and calling the Court's attention to the note appended thereto, which, however, is not exhaustive.

A further full discussion of this subject is found in *Oliver v. Ayler,* 158 S. W. 733 (Mo.); *Michaels v. Harvey,* 179 S. W. 735. See also *Priebe v. Crandall,* 187 S. W. 905 (Mo.); *O'Brien v. Western Implement Mfg. Co.,* 125 S. W. 804 (Mo.).

In the case of *Fulsom-Morris Coal & Mining Co. v. Mitchell,* 132 Pac. 1103, the Supreme Court of Oklahoma, approving its ruling in *Roeser v. Pease* (*supra*), say:

> "Defendant was informed on the first day of trial that Dr. Logan had been called in attendance upon the plaintiff. Presumably his attendance if procurable by the plaintiff, could likewise have been obtained by defendant, if desired. The doctor's testimony was no longer privileged under section 842 Comp. Laws 1909. The plaintiff having proffered himself as a witness and testified specifically in regard to his injuries, the doctor's testimony would have been competent either for or against him."

And again, in *City of Tulsa v. Wicker,* 141 Pac. 963, (Okla.), it appeared that during the course of the trial plaintiff offered himself as a witness in her own behalf and testified as to the nature and extent of her injuries, and the time and place of treatment of the same. Her testimony as to the nature and extent of her injuries was that she was badly bruised across the left hip and that said bruise was six inches long and as wide as her two fingers; and as a result of such injuries she suffered great pain and was unable to sleep for fourteen

months, and as a result became very nervous. Her testimony touching the time and place of treatment was that in January, 1910, she consulted Dr. J. E. Webb, who prescribed for her and she remained under his care until August of the same year, after which time she called at his office for treatment on various occasions. In holding that the exclusion of Dr. Webb's testimony was error the Supreme Court of Oklahoma say:

> "This court held in Roeser v. Pease, 37 Okl. 222, 132 Pac. 534, St. L. & St. R. Co. v. Hurley, 30 Okl. 333, 120 Pac. 568, and Fulsom-Morris C. & M. Co. v. Mitchell, 37 Okl. 575, 132 Pac. 1103, that the testimony of the physician or surgeon concerning any knowledge obtained by him from a physical examination of the patient may be required by the opposite party, if the patient offer himself as a witness and testify upon the same subject. See also Wigmore on Evidence, paragraph 2380 et seq.; 10 Enc. of Evi. p. 147; Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb. 39, 89 N. W. 448; Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488; Rauh v. Deutscher Verein, 29 App. Div. 483, 51 N. Y. Supp. 985; Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Treanor v. Manhattan Ry Co. (Com. Pl.) 16 N. Y. Supp. 536; Marx v. Railway Co., 56 Hun. 575, 10 N. Y. Supp. 159; Morris v. N. Y. & W. Ry. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675; In re Burnette, 73 Kan. 609, 85 Pac. 575."

In the case of *Capron v. Douglas,* 85 N. E. 827 (N. Y.), it was held that where plaintiff testifies as to injuries or permits others to do so it is a waiver of her privilege against the testimony of still other physicians.

See likewise *Speck v. International Ry. Co.,* 118 N. Y. Supp. 71.

As indicating this view of the law see *Hunt v. Blackburn,* 128 U. S. 464, 32 Law Ed. 488; *U. P. Ry. Co. v. Thomas,* 152 Fed. 365 (8 C. C. A.).

As likewise bearing upon the subject see *Farnley v. Farnley,* 98 Pac. 819 (Colo.); *State v. Bennett,* 110 N. W. 150 (Ia.); *Woods v. Incorporated Town of Lisbon,* 130 N. W. 372 (Ia.); *Kelley v. Cummons,* 121 N. W. 540 (Ia.); *State v. Hoben,* 102 Pac. 1000 (Utah).

It is only fair to the Court to call the Court's attention to *Jones v. the City of Caldwell,* 20 Ida. 5; 116 Pac. 110, in which apparently the contrary rule is announced, and further to state that much authority can be found in the adjudicated cases to sustain the proposition that calling one physician does not waive the privilege as to another physician who had been called in attendance. However, the Idaho case cited, and none of the others which have been found, go to the extent of saying that where a fraud is attempted to be perpetrated upon the defendant and the court, such testimony will be excluded on the ground of privilege. We therefore say that the Idaho case and others which might be found to the same effect, are not conclusive upon the proposition for which we are contending, namely, that reason and justice demand that a plaintiff

in a personal injury suit should not be permtited, when he has disclosed to all the world the manner and character of his illness, to withhold from the Court and the jury the truth and deny the defendant, from whom he seeks damages, the opportunity to prove that the injuries of which he complains, and which he charges the defendant with negligently inflicting upon him, were not as a matter of fact caused by the defendant but existed long prior to the time that the plaintiff was injured. The contrary rule is not based upon reason and justice and should be discredited.

Respectfully submitted,

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